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IN THE

Supreme Court of the United States

OCTOBER TERM, 1995

PEOPLE OF THE STATE OF ILLINOIS,

Petitioner,

vs.

JOHN KIMERY,

Respondent.

Petition for Writ of Certiorari to the Supreme Court of Illinois

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. Whether the Double Jeopardy Clause bars parallel civil forfeiture and criminal actions.

2. Whether a civil forfeiture and a criminal prosecution constitute double jeopardy under the *Blockburger* test.

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Petitioner, the State of Illinois, respectfully prays that a Writ of Certiorari be issued to review the judgment of the Supreme Court of Illinois.

OPINION BELOW

The Supreme Court of Illinois issued its opinion in this case on January 18, 1996. The opinion in this case is not yet reported. In its decision, the court determined that the civil forfeiture of John Kimery's vehicle constituted

"punishment" for double jeopardy purposes, that the civil forfeiture of John Kimery's vehicle and the criminal prosecution against him constituted punishments for the same offense, and that the civil forfeiture and criminal prosecution were separate proceedings. The court thus concluded that the trial court erred in denying Kimery's motion to dismiss the criminal charge against him on double jeopardy grounds.

The Supreme Court of Illinois accordingly affirmed the decision of the Illinois Appellate Court, which had reversed the trial court's order denying Kimery's motion to dismiss criminal charges. The decision of the Appellate Court was entered as an order pursuant to Illincis Supreme Court Rule 23. (*In re P.S., a Minor, et al*, Nos. 2-93-1050 and 2-93-1212 (Rule 23 Order entered March 1, 1995)). Copies of the Appellate Court decision, its order denying rehearing, and the opinion of the Supreme Court of Illinois are included in the appendix to this Petition.

JURISDICTION OF THE COURT

The opinion of the Supreme Court of Illinois, affirming the decision of the Appellate Court of Illinois and reversing the order of the Circuit Court, was issued January 18, 1996. This Petition is filed within ninety days of that opinion.

This Court's jurisdiction is invoked under 28 U.S.C. §1257(3), since in the proceedings in the state courts of Illinois the respondent has asserted an alleged violation of his rights arising under the United States Constitution.

CONSTITUTIONAL PROVISIONS INVOLVED

United States Constitution, Amendment V provides:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall he be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property without due process of law; nor shall private property be taken for public use, without just compensation.

STATEMENT OF THE CASE

As the procedural history of this matter is convoluted, a brief summary is provided. The case originated as four separate appeals by defendants Turner, Towns and Kimery and P.S., a minor. For purposes of decision, the Appellate Court of Illinois consolidated the four appeals into two. In its first decision, involving defendants Towns and Turner, the Appellate Court held that defendant Towns had not suffered a double jeopardy violation and upheld the criminal charges against him. However, the court found a jeopardy violation as to defendant Turner and dismissed the criminal charges against him. (*People* v. *Towns*, 269 Ill.App.3d 907, 646 N.E.2d 1366, 207 Ill. Dec. 279 (2nd Dist. 1995)). The second decision, involving respondent Kimery and the Minor, P.S., held that forfeitures of property belonging to the respondent and the minor constituted initial jeopardies and therefore ordered

the dismissal of the respective criminal charges. (*In re P.S., a Minor, et al*), Nos. 2-93-1050 and 2-93-1212 (Rule 23 Order entered March 1, 1995)).

Petitioner, the People of the State of Illinois, appealed the decisions in the cases of defendant Turner, respondent Kimery and P.S., a Minor, to the Supreme Court of Illinois in one consolidated appeal. In its decision, the Supreme Court of Illinois reversed the dismissal of criminal charges against defendant Turner and the minor, P.S., but affirmed the dismissal of criminal charges against respondent Kimery finding them barred by double jeopardy considerations. (*In re P.S., a Minor, et al*), ___ Ill.2d ___ (Nos. 78910 and 78944 cons., January 18, 1996)). The instant petition addresses only the matter involving respondent Kimery. A factual history of that case follows.

On October 22, 1991, the respondent, John Kimery, was indicted by a Grand Jury in the Circuit Court of Kane County, Illinois, on one count of unlawful possession of a controlled substance, *Ill.Rev.Stat.*1991, ch. 56½, par. 1402(c). (C. 5).[1]

The indictment stemmed from an October 6, 1991 incident which also resulted in the seizure of the respondent's automobile. (F.R. 24). That vehicle was the subject of a forfeiture action commenced on November 1, 1991. (F.C. 1). The Circuit Court of Kane County, Illinois subsequently ordered the automobile forfeited, and the Illi-

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[1] The record on appeal below consisted of the record from defendant Kimery's criminal case and the record from the forfeiture case. References to the criminal record will be cited as "C.C. ___" or "C.R. ___." References to the forfeiture record will be cited as "F.C. ___" or "F.R. ___."

nois Appellate Court affirmed the forfeiture in an opinion filed on February 22, 1994. (*People* v. *One 1982 Maroon Ford Mustang*, 258 Ill.App.3d 127, 630 N.E.2d 137, 196 Ill.Dec. 440 (2nd Dist. 1994)).

The respondent entered a plea of guilty in the criminal case on April 12, 1993. (C.C. 54). Prior to sentencing, the respondent moved to vacate his guilty plea and dismiss the charges against him. (C.C. 58). The basis for the motion to dismiss was that the criminal prosecution was barred by double jeopardy in light of the previous forfeiture. The Circuit Court of Kane County, Illinois denied the respondent's motion and sentenced him to a one year term of imprisonment. (C.C. 89). The respondent timely appealed, and the Appellate Court of Illinois, Second Judicial District, vacated the denial of the motion to dismiss, vacated the conviction and sentence against respondent Kimery, and dismissed the criminal charges against him. Petitioner sought leave to appeal to the Supreme Court of Illinois.

The Supreme Court of Illinois affirmed the Appellate Court decision on January 18, 1996, finding that the criminal prosecution of respondent Kimery following the forfeiture of his vehicle was prohibited by the double jeopardy clause. Petitioner now timely petitions this Court for a Writ of Certiorari.

REASONS FOR GRANTING THE WRIT

I.

THE DOUBLE JEOPARDY CLAUSE DOES NOT BAR PARALLEL CIVIL FORFEITURE AND CRIMINAL ACTIONS.

The respondent, John Kimery, was charged with a violation of the Illinois Controlled Substances Act, (720 ILCS 570/100 *et seq.* (West 1992) (formerly *Ill.Rev.Stat.* 1991, ch. 56½, par. 1100 *et seq.*)). The incident which resulted in the criminal charge also resulted in a forfeiture action pursuant to the forfeiture provisions of the Controlled Substances Act, against an automobile seized from the respondent. The forfeiture action resulted in the forfeiture of the property. (F.C. 49). Following the forfeiture, the respondent filed a motion to dismiss the criminal charges against him, claiming that the criminal prosecution was barred by double jeopardy. The trial court denied the motion. (C.C. 89).

On appeal, both the Appellate Court of Illinois, Second Judicial District, and the Supreme Court of Illinois held that the trial court had erred and determined that the forfeiture of the respondent's vehicle constituted punishment for the purposes of double jeopardy and barred a conviction resulting from a parallel criminal prosecution. *In re P.S., a Minor, et al*, Nos. 2-93-1050 and 2-93-1212 (Rule 23 Order entered March 1, 1995); ___ Ill.2d ___ (Nos. 78910 and 78944, January 18, 1996).

The Supreme Court of Illinois determined that a civil asset forfeiture under the forfeiture provisions of the Controlled Substances Act or the Cannabis Control Act constitutes a punishment, implicating the double jeopardy clause barring a subsequent criminal prosecution based on the same conduct which resulted in the forfei-

ture. The Court's conclusion is grounded in its interpretation of *Austin* v. *United States*, 509 U.S. ___, 113 S.Ct. 2801, 125 L.Ed.2d 488 (1993), *Department of Revenue of Montana* v. *Kurth Ranch*, ___ U.S. ___, 114 S.Ct. 1937, 128 L.Ed.2d 767 (1994), and *United States* v. *Halper*, 490 U.S. 435, 109 S.Ct. 1892, 104 L.Ed.2d 487 (1989). It is the position of the Supreme Court of Illinois that those decisions apply to drug asset forfeitures and require the conclusion that the forfeiture in the instant case implicated double jeopardy and barred a conviction resulting from a parallel criminal prosecution. Petitioner submits that the conclusion reached by the Supreme Court of Illinois stems from an erroneous interpretation of the subject statutes and caselaw.

Initially, Petitioner questions the Illinois Supreme Court's interpretation of and reliance on this Court's decisions in *Austin* and *Kurth Ranch*, in the context of a Fifth Amendment double jeopardy challenge involving a civil asset forfeiture. Petitioner acknowledges that the decisions in *Austin* and *Kurth Ranch* share certain language that has become a kind of mantra in the current civil asset forfeiture debate, but asserts that those two decisions do not resolve the issues presented in this case.

In *Austin*, which contemplated the applicability of the excessive fines clause of the Eighth Amendment to forfeiture proceedings, this Court stated that forfeitures under the federal statutory provisions for forfeiture of real property and vehicles used to facilitate drug crimes, (21 U.S.C. §§ 881(a)(4) and (a)(7)), constitute monetary punishment and are subject to the limitations of the Eighth Amendment. (113 S.Ct. at 2812). Although this Court referred to the double jeopardy clause in an early footnote in the decision (113 S.Ct. at 2805), the case did

not involve a double jeopardy issue. While the footnote reference may indicate that this Court was aware of potential jeopardy implications, it did not grapple with the double jeopardy issue at any point in the decision. Petitioner submits that by labeling forfeitures "punishment" for purposes of Eighth Amendment scrutiny, this Court did not settle this double jeopardy argument involving the Fifth Amendment. A determination that forfeiture triggers an excessive fines analysis contemplates a possible reduction in sanction if the forfeiture is found excessive. This is very different indeed from the termination of a criminal action against a defendant which would result from the blanket application of the *Austin* language to Fifth Amendment double jeopardy.

Similarly, reliance on *Kurth Ranch* was inappropriate. *Kurth Ranch* involved a tax, distinguishing it from a forfeiture case. Additionally, *Kurth Ranch* is a very fact-specific decision, construing a particular Montana tax statute. Nothing in that decision directed a specific finding in this case, and this Court endeavored to limit the decision to its facts. (511 U.S. ___, 114 S.Ct. at 1497, fn. 21).

The Illinois Supreme Court's interpretation of *Austin* and *Kurth Ranch* as applicable to the instant case found support in decisions from various state and federal appeals courts, particularly those located within the purview of the Ninth Circuit Court of Appeals. Prominently cited is *United States* v. *$405,089.23 U.S. Currency*, 33 F.3d 1210 (9th Cir. 1994), in which the Ninth Circuit Court of Appeals found *Austin* definitive on the issue of forfeitures and double jeopardy. The focus in *$405,089.23 U.S. Currency*, as in the Illinois Supreme Court decision, was on the characterization of an asset forfeiture as

"punishment." As *Austin* acknowledged, this is not a new concept; forfeiture throughout the ages has been recognized as at least partially punitive. (*Austin*, 113 S.Ct. at 2806-2809).

The reasoning behind the leap from *Austin's* restatement that a forfeiture has a "punishment" component to the conclusion that a forfeiture implicates double jeopardy apparently rests with the notion that forfeiture, as a "punishment," necessarily triggers what is referred to as the multiple punishment prong of the double jeopardy clause. (*See, North Carolina* v. *Pearce*, 395 U.S. 711, 89 S.Ct. 2072, 23 L.Ed.2d 656 (1969)). Petitioner asserts that such a leap oversimplifies the complex distinctions between the Excessive Fines Clause and the Double Jeopardy Clause. It is the intent of the Double Jeopardy Clause that should be the focus of a review of this issue.

The Illinois legislature enacted provisions for *in rem* forfeitures within the Controlled Substances Act as part of a comprehensive system aimed at controlling the use and distribution of cannabis and controlled substances. (720 ILCS 570/401 et seq. (West 1992)). The enactment of a criminal penalty and a civil sanction for an offense has been an historically accepted practice not offensive to double jeopardy protections. In a concurring opinion in *United States ex rel. Marcus* v. *Hess*, 317 U.S. 537, 63 S.Ct. 379, 87 L.Ed. 443 (1943), Justice Frankfurter observed:

> "[L]egislation of this character providing two sanctions for the same misconduct, enforceable in separate proceedings, one a conventional criminal prosecution, and the other a forfeiture proceeding. . .was quite common when the Fifth Amendment was framed by Congress. [Citations omitted]. Like other

> specific provisions of the Constitution, the double jeopardy clause must be read in the context of its times. It would do violence to proper regard for the framers of the Fifth Amendment to assume that they contemporaneously enacted and continued to enact legislation that was offensive to the guarantees of the double jeopardy clause which they had proposed for ratification."

(63 S.Ct. at 390). Petitioner acknowledges that this line of analysis calls into question the viability of the "multiple punishment" prong of the double jeopardy clause as it has evolved in the context of civil forfeitures. This question is not novel, having been addressed by Justice Scalia in his dissent in *Kurth Ranch*. (511 U.S. at ___, 114 S.Ct. at 1955).

The idea that a civil forfeiture and a criminal prosecution based upon the same conduct causes one to be "twice put in jeopardy of life or limb," the conduct prohibited by the double jeopardy clause, mocks the clause itself. The legislature is permitted to enact punishments it deems appropriate, and a determination that multiple sanctions are appropriate does not cause a jeopardy concern. This Court has noted this, stating that, "the question whether punishments imposed by a court after the defendant's conviction upon criminal charges are unconstitutionally multiple cannot be resolved without determining what punishments the Legislative Branch has authorized." (*Whalen* v. *United States*, 445 U.S. 684, 100 S.Ct. 1432, 1436, 63 L.Ed.2d 715 (1980)). In *Whalen*, this Court explained that imposition of a fine *and* a prison sentence where the legislature had provided for a fine *or* a prison sentence would violate double jeopardy. A fine and a prison term provided by a legislature, however, would not cause such a concern. (100 S.Ct. at 1436). Justice

Blackmun, in a concurring opinion stated, "The *only* function the Double Jeopardy Clause serves in cases challenging multiple punishments is to prevent the prosecutor from bringing more charges, and the sentencing court from imposing greater punishments, than the Legislative Branch intended." (100 S.Ct. at 1440). Nothing in the instant case overreaches the intent of the legislature.

The canard that the forfeiture and criminal prosecution in the instant case constitute jeopardy violative multiple punishments is disputed by the suggestions of the very courts that perpetuate it. In *$405,089.23 U.S. Currency*, the Ninth Circuit Court of Appeals suggested that the jeopardy violation could be avoided by bringing the forfeiture action simultaneously with the criminal action. (33 F.3d at 1216). Petitioner respectfully questions the logic of that conclusion. A forfeiture is an *in rem* proceeding. *In rem* is "a term used to designate proceedings or actions instituted against the thing," as opposed to personal actions. (*Black's Law Dictionary*, 5th Ed.). It is this legal fiction of *in rem* proceedings that results in separate actions for the civil forfeiture and the criminal prosecutions. Petitioner does not contend for purposes of this argument that the traditional *in rem* nature of civil forfeitures precludes them from imposing punishment. (*See*, *Austin*, 509 U.S. at ___, 113 S.Ct. at 2808, fn. 9). It is the adoption of the legal fiction of *in rem* proceedings by our court systems, however, that leads to individual forfeiture and criminal actions.

Imposing criminal punishments and forfeitures in the same proceeding—the same courtroom—does not alter the sanctions themselves. The defendant still suffers a criminal penalty and the property is still forfeited,

whether on one day in one courtroom or in separate courtrooms several weeks apart. The suggestion that a literal "single proceeding" is somehow less violative of the double jeopardy clause than two proceedings when the "punishments" remain the same is merely a further legal fiction.

The Second and Eleventh and most recently the Eighth Circuit United States Courts of Appeals have recognized the absurdity of requiring a literal "single proceeding," and have instead found forfeiture actions and criminal prosecutions based upon the same conduct to be parts of a single, coordinated prosecution. The United States Court of Appeals—Second Circuit addressed the issue in *United States* v. *Millan*, 2 F.3d 17 (2nd Cir. 1993). *Millan* involved a criminal indictment against the defendants for drug offenses and a criminal forfeiture action as well as a civil forfeiture action against their property under the federal civil forfeiture statute. (2 F.3d at 18). Before trial on the criminal charges, the defendants entered into an agreed stipulation under which the civil suit was dismissed in return for the forfeiture of some of the property named in the criminal and civil forfeiture actions. (2 F.3d at 19). The defendants subsequently moved to dismiss the criminal indictment on double jeopardy grounds. (*Id.*)

The Circuit Court of Appeals found no double jeopardy implications as a result of the simultaneous criminal and civil forfeiture actions, holding that they were "but different prongs of a single prosecution of the [defendants] by the government." (2 F.3d at 20). The Court cited several factors in reaching its conclusion, finding persuasive the fact that the warrants for civil seizure and criminal arrest were issued on the same date and were based on

the same affidavit of a DEA agent and that the defendants were aware of the criminal charges against them when they entered into the stipulation. (*Id.*)

The United States Court of Appeals—Eleventh Circuit similarly held that there was no double jeopardy bar to a forfeiture action after a criminal conviction had been obtained against the defendant in *United States* v. *One Single Family Residence Located at 18755 North Bay Road*, 13 F.3d 1493 (11th Cir. 1994). In *18755 North Bay Road*, the forfeiture action was commenced the day after seizure of the property, but an indictment was filed five months later. A government motion for summary judgment in the forfeiture action was granted following the defendant's conviction. (13 F.3d at 1494-1495). The Eleventh Circuit Court of Appeals, citing *Halper* and *Millan*, held that the "circumstances of the simultaneous pursuit by the government of criminal and civil sanctions against [the defendant] . . . falls within the contours of a single, coordinated prosecution." (13 F.3d at 1499). Most recently, the United States Court of Appeals—Eighth Circuit found no jeopardy violation where a forfeiture action was commenced two days after an indictment and the defendant settled the forfeiture action before pleading guilty to one count of the indictment. (*United States* v. *Smith*, ___ F.3d ___ (No. 95-1568, 8th Cir., January 31, 1996)).

The *Millan* Court was not persuaded by the defendant's argument that the civil and criminal actions were filed separately, with different docket numbers, thereby showing distinct actions. In deciding whether a single proceeding exists, the Court stated, it "must look past the procedural requirements [of the court system] and examine the essence of the actions at hand by determin-

ing when, how, and why the civil and criminal actions were initiated." (2 F.3d at 20). Similarly, the *Smith* Court noted that the "commonplace observation" that criminal and civil matters are adjudicated in separate cases in our justice system should not preclude prosecutors from seeking both criminal and civil penalties against drug offenders. (*Smith*, ___ F.3d at ___ (Slip Op., p. 3).

As in the federal system, civil and criminal actions are separately docketed in Illinois. The differing case numbers here do not undermine the Petitioner's position that it was pursuing a single, coordinated prosecution of the respondent. The civil and criminal actions were initiated on the same dates, by the seizure of the vehicle and the arrest of the respondent. The actions were undertaken by the Kane County State's Attorney's Office which sought to obtain the full range of civil and criminal penalties authorized by the legislature. The "why," "when" and "how" of these actions indicate a single coordinated prosecution in each case.

In *Millan*, *18755 North Bay Road* and *Smith*, the Courts addressed the concern expressed in *Halper* that the government might act abusively by seeking a second punishment when it is dissatisfied with the sanction levied in the first action. (*Halper*, 109 S.Ct. at 1903, n. 10; *Millan*, 2 F.3d at 20-21; *18755 North Bay Road*, 13 F.3d at 1499; *Smith*, ___ F.3d at ___, (Slip Op., p. 3)). Each court stated that the legislature authorized cumulative punishment under two statutes and that the procedural record in each case showed the civil and criminal prosecutions to be contemporaneous rather than consecutive. (*Millan*, 2 F.3d at 20; *18755 North Bay Road*, 13 F.3d at 1499; *Smith*, F.3d at ___ (Slip Op., p. 3)). The

records in the instant case demonstrates that the civil and criminal actions were contemporaneous, not consecutive. The seizure and arrest occurred on the same date. The proceedings in each case tracked one another, and nothing in the records suggests an abusive action by the government to seek a second punishment due to dissatisfaction with the outcome of the first action. No punishment had yet been imposed in either case on the date of its initiation. The respondent was aware of the ongoing civil and criminal prongs of the prosecution from the onset.

The Supreme Court of Illinois rejected the Petitioner's argument that it was pursuing a single, coordinated prosecution of the respondent by all means made available to it under the Controlled Substances Act. (*P.S.*, ___ Ill.2d at ___ (Slip Op. at 23-24)). The Petitioner contends that the Illinois Supreme Court's rejection stems from its continued failure to recognize that the double jeopardy clause does not bar separate civil and criminal proceedings in this context. Petitioner cites again the comments of Justice Frankfurter, concurring in *Hess*:

> "In my view, the proper approach to the problem of double jeopardy in a situation. . .where Congress has imposed two sanctions for misconduct, however one may label them, and has provided for their enforcement in two separate proceedings, is that which was taken by Judge (later Mr. Justice) Blatchford in *Re Leszynsky* [Citations omitted]. The short of it is that where two such proceedings merely carry out the remedies which Congress has prescribed in advance for a wrong, *they do not twice put a man in jeopardy for the same offense*. Congress thereby merely allows the comprehensive penalties which it has imposed to be enforced in separate suits instead of a single pro-

> ceeding. By doing this Congress does not impose more than a single punishment. And the double jeopardy clause does not prevent Congress from prescribing such a procedure for the vindication of punitive remedies." (Emphasis added.)

(*Hess*, 63 S.Ct. at 389-390).

Petitioner asserts that reliance by the Supreme Court of Illinois on *Austin* and *Kurth Ranch* is misplaced, as those decisions are not directed at this issue and therefore do not provide a catalyst for this line of litigation. If forfeiture as "punishment" violates double jeopardy, it has been doing so forever. The mere use of the term "punishment" to describe forfeitures in the *Austin* decision does not necessarily trigger what is referred to as the multiple punishment prong of the double jeopardy clause. The excessive fines analysis in *Austin* provides protection against arbitrary and grossly disproportionate forfeitures. Legislatures are given the power to promulgate laws and set forth appropriate consequences for various actions by citizens. The Excessive Fines Clause provides the substantive limits on the bounds of the legislative punishment. Broader application of the *Austin* decision is unnecessary.

The Illinois legislature properly authorized both civil and criminal penalties for a violation of the Controlled Substances Act. Simultaneous efforts to obtain both civil and criminal penalties in these cases do not constitute a violation of the Double Jeopardy Clause. Petitioner requests that this Court grant certiorari to examine the multiple punishments prong of the Double Jeopardy Clause and the applicability of its decision in *Austin* thereto, and further requests that the judgment of the Supreme Court of Illinois be reversed.

II.

A CIVIL FORFEITURE AND A CRIMINAL PROSECUTION DO NOT CONSTITUTE DOUBLE JEOPARDY UNDER THE *BLOCKBURGER* TEST.

Double jeopardy principles do not prohibit the imposition of all successive punishments, but only those imposed for the same offense. (*United States* v. *Dixon*, ___ U.S. ___, 113 S.Ct. 2849, 2855, 125 L.Ed.2d 556 (1993)). In the case at bar, the Supreme Court of Illinois concluded that the civil forfeiture and criminal conviction constituted punishments for the same offense. (*In re P.S., a Minor, et al*, ___ Ill.2d ___, (Nos. 78910 & 78944, January 18, 1996) (Slip Op., p. 13)). The Petitioner must disagree. Even if this Court should determine that a civil asset forfeiture constitutes punishment for purposes of double jeopardy and can potentially bar a subsequent criminal prosecution, the Illinois actions involved here do not constitute the same offense.

The test for determining whether the two offenses for which a defendant is being punished are jeopardy violative is set forth in *Blockburger* v. *United States*, 284 U.S. 299, 304, 52 S.Ct. 180, 182, 76 L.Ed.2d 306 (1982), and reaffirmed in *United States* v. *Dixon*, *supra*. The same-elements, or *Blockburger*, test inquires whether each offense contains an element not contained in the other; if so, then there is no jeopardy problem. When applying the *Blockburger* test, courts must focus upon "the statutory elements of each offense, rather than on the actual evidence presented at trial." (*Illinois* v. *Vitale*, 447 U.S. 410, 100 S.Ct. 2260, 65 L.Ed.2d 228 (1980)).

A criminal prosecution and a civil forfeiture each always require proof of an element that the other does not. Therefore, separate criminal prosecutions and civil

forfeitures, even where based on precisely the same statutory violations and criminal conduct, do not implicate the Double Jeopardy Clause. In a criminal case, because the statute is *in personam*, the prosecution must prove that the crime was committed *by the defendant*. However, because a forfeiture case is *in rem*, the defendant's involvement is not an element that the prosecution must prove. Conversely, in a forfeiture case the State must prove that the subject property was involved in a criminal offense, while a criminal prosecution contains no such element. Thus, under the *Blockburger* test, a civil forfeiture never has the "same elements" as a criminal offense.

In the instant matter, the respondent was charged with possession of a controlled substance pursuant to *Ill. Rev.Stat.*1991, ch. 56½, par. 1402(c). The respondent's vehicle was ordered forfeited pursuant to section 505(a)(3) of the Illinois Controlled Substances Act, which provides for forfeiture of "vehicles . . . which are used, or intended for use, to transport, or in any manner to facilitate the transportation, sale, receipt, possession or concealment of" controlled substances. (*Ill.Rev.Stat.*1991, ch. 56½, par. 1505(a)(3)).

The Supreme Court of Illinois held that "any forfeiture under section 505(a)(3) . . . requires proof of a criminal offense under the Controlled Substances Act," and reasoned, therefore, that "the State could not confiscate [Respondent] Kimery's vehicle without a showing that *he* possessed a controlled substance." (*P.S.*, ___ Ill.2d at ___ (Slip Op., p. 13)). (Emphasis added.) Since a conviction for possession of a controlled substance requires the State to prove the *defendant* possessed the substance, the Supreme Court of Illinois determined that the

offenses required proof of the same elements and were, therefore, the same offense.

The Supreme Court of Illinois suggests that any other conclusion is the result of a circular or illusory theory, citing several federal circuit court decisions. Additionally, the Supreme Court of Illinois cites *Austin*, stating that that decision seems to set aside the legal fiction of *in rem* that the property, rather than the owner, is the offender. (*Id*). Petitioner respectfully suggests that nothing in the *Austin* decision defeats the conclusion that the criminal offense requires proof that the forfeiture action does not. Although this Court did suggest in *Austin* that a civil forfeiture acts as "punishment" to the property owner (509 U.S. at ___, 113 S.Ct. at 2809), the fact remains that forfeiture of property can occur without any criminal action by its owner. The statute requires proof of a criminal offense, but does not specify that the offense be committed by the property owner. (*Ill.Rev.Stat.*1991, ch. 56½, par. 1402).

The Supreme Court of Illinois seems to confuse this Court's conclusions in *Austin* regarding punishment of an owner with the idea of an offense by the property owner. The Petitioner requests that this Court grant certiorari to examine the applicability of the *Blockburger* test in this context and reverse the judgment of the Supreme Court of Illinois.

CONCLUSION

For the foregoing reasons, Petitioner respectfully requests that a Writ of Certiorari be issued to review the decision of the Supreme Court of the State of Illinois

and, upon review, to reverse that court's decision in this case.

Respectfully submitted,

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